IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-498

ARTHUR C. KAPPELMANN, ET UX.,
Petitioners,

v.

DELTA AIR LINES, INC., ET AL.,
Respondents.

On Petition For a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF FOR RESPONDENT DELTA AIR LINES, INC. IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

Of Counsel:

HALE RUSSELL GRAY
SEAMAN & BIRKETT
1001 Connecticut Avenue, N.W.
Washington, D.C. 20036

CONDON & FORSYTH
1251 Avenue of the Americas
New York, New York 10020

ROBERT REED GRAY
JOHN E. GILLICK, JR.
1001 Connecticut Avenue, N.W.
Washington, D.C. 20036

Attorneys for Respondent Delta Air Lines, Inc.

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Delta Air Lines, Inc. (hereinafter "Delta"), respondent herein, prays that this Court will deny the Petition for Writ of Certiorari filed in No. 76-498 on behalf of petitioners Mr. & Mrs. Arthur C. Kappelmann. The petition seeks review of the judgment of the United States Court of Appeals for the District of Columbia Circuit entered in *Arthur C. Kappelmann,*

et al. v. *Delta Air Lines, Inc., et al.*, 539 F.2d 165 (1976) (Pet. App. A & B.)[1]

JURISDICTION

The opinion of the court of appeals was issued on April 16, 1976. The petition for rehearing filed by petitioners was denied by the court of appeals on July 12, 1976. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTION PRESENTED

Respondent Delta disagrees with the petitioners' statement of the question presented and therefore restates it as follows:

Whether, under the circumstances presented, the court of appeals erred in affirming the district court's dismissal of petitioners' request for injunctive relief against Delta on the ground that the doctrine of primary jurisdiction required that resort, in the first instance, should be made to the Department of Transportation.

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[1] The court of appeals issued its initial opinion on April 16, 1976, and its supplemental opinion on July 12, 1976, denying the petition for rehearing filed by petitioners. Citations to the opinions below will be to either Appendix A or Appendix B of the Petition in No. 76-498, *e.g.*, "(Pet. App. A., pp. -)." References to material in the printed Joint Appendix will be by page number thereof, preceded by the symbol "J.A.", *e.g.*, "(J.A., p.)." The statutory material appended to this Brief in Opposition will be cited, for example, as "(App. I, p.)."

STATUTES INVOLVED

The pertinent provisions of the Federal Aviation Act of 1958, 72 Stat. 731, 49 U.S.C. § 1301 *et seq.*, the Hazardous Materials Transportation Act, 88 Stat. 2156, 49 U.S.C. § 1801 *et seq.*, and the Administrative Procedure Act, 80 Stat. 381, 5 U.S.C. § 551 *et seq.*, are set forth in Appendix I hereto, pages 1a-7a, *infra*.

STATEMENT

This case arises out of the alleged exposure of Petitioner Arthur C. Kappelmann to radiation claimed to have emanated from an improperly packaged radioactive materials shipment carried in the cargo section of a Delta aircraft on which Mr. Kappelmann traveled from Washington, D.C. to Atlanta, Georgia on April 5, 1974. Although Mr. Kappelmann was apparently unaware of the alleged exposure to radiation, he was contacted shortly thereafter by Delta Air Lines' representatives, informed of the incident and told that, if he desired to consult a physician, Delta would defray the expense of such an examination.

On November 18, 1974, Petitioners, Arthur C. Kappelmann and his wife,[2] commenced this action

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[2] As the court of appeals carefully and properly pointed out below, this case in *not* a class action and the district court did not, as discussed *infra*, dismiss a "class action claim for injunctive relief". (Pet. App. A, pp. 2a-3a). Petitioners have never sought, nor obtained, a certification of class action, nor have they complied with the requirements for class actions set forth in Rule 1-13 of the Rules of the United States District

against Delta Air Lines, Inc., Value Engineering Company, the Civil Aeronautics Board, the Department of Transportation and the Federal Aviation Administration concerning this incident. In the complaint (J.A. 5-10), Petitioners seek, *inter alia*, damages against Delta and Value Engineering for alleged injuries resulting from the above-referenced incident in the total amount of $600,000 and, as against Delta, temporary and permanent injunctive relief requiring Delta to give "adequate warning" of the presence of a "significant amount" of radioactive materials to (a) all prospective passengers who may be boarding airplanes operated as passenger flights by Delta and carrying a "significant amount" of radioactive materials; or, in the alternative, (b) all prospective passengers who may be boarding airplanes operated as passenger flights by Delta and carrying a "significant" amount of radioactive materials, which passengers have "been exposed" previously to a "significant" amount of radiation. (J.A. 10; Pet. App. A, p. 5a.) Delta filed a timely answer to the complaint and, *inter alia*, set forth, as an affirmative defense, that the doctrine of primary administrative jurisdiction was applicable to the injunctive relief sought against Delta. (J.A. 13.)

Petitioners, on April 14, 1975, filed a "Motion for Summary Judgment on Issue of Injunctive Relief or,

Court for the District of Columbia. Moreover, a request for certification of the *Penna* case (arising out of the same incident as is the subject of this litigation) as a class action was denied by District Judge Hart on November 6, 1974. *Penna* v. *Value Engineering Co.*, Civ. No. 74-704 (D.D.C.)

Alternatively, for Preliminary Injunction" (J.A. 20) seeking the above-described mandatory injunctive relief, to which motion Delta timely responded and filed its own motion and supporting materials seeking, *inter alia*, dismissal of the injunctive relief counts on the ground that the doctrine of primary jurisdiction requires that plaintiffs resort first to the appropriate administrative agency for relief and that, under the circumstances presented, petitioners' requests for injunctive relief should be dismissed. (J.A. 21.)

On July 8, 1975, the district court, *inter alia*,[3] dismissed the injunctive relief counts of the complaint chiefly on the ground that the doctrine of primary jurisdiction requires that resort first be made to the administrative agency for relief, finding that: (a) Congress, in enacting the Hazardous Materials Transportation Act, had crafted a comprehensive federal scheme for the regulation of hazardous materials transportation which granted extensive investigative, rulemaking, and regulatory authority concerning such transportation to the Secretary of Transportation; (b) although petitioners could petition for a regulation requiring airlines to give the warning sought herein, petitioners had not sought the promulgation of such a regulation; (c) the

[3]The district court, in addition to dismissing the injunctive relief counts of petitioners' complaint, also granted the motion of the government defendants to dismiss the complaint as to them for failure to state a claim over which the court had jurisdiction or upon which relief could be granted. (J.A. 135).

requested relief involves both technical and policy questions which have industry-wide application; (d) in view of the stated intention of the Congress, set forth in the declaration of policy of the Hazardous Materials Transportation Act, 49 U.S.C. § 1801 (App. I, p. 3a), to improve the regulatory and enforcement authority of the Secretary of Transportation, it should be the agency (the Department of Transportation) charged with carrying out that policy that makes the initial decision whether the dangers and risks involved in the transportation of radioactive materials require that special warnings be posted; and (e) under these circumstances, even if a common-law right of warning under certain circumstances exists, it is proper for the court to allow the agency to resolve the issues first since "'the enforcement of the claim requires the resolution of issues which, under a regulatory scheme, have been placed within the special competence of an administrative body ....' *United States* v. *Western Pacific R.R. Co.*, 352 U.S. 59, 64 (1956)." (J.A. 133-37.)

On review by the United States Court of Appeals for the District of Columbia Circuit, that court affirmed, *inter alia*,[4] the district court's dismissal of

[4]The court of appeals also granted the government defendants' motion to dismiss the appeal on the grounds that the ruling of the trial judge, dismissing the complaint as to these defendants, was neither a "final decision" within the meaning of 28 U.S.C. § 1291 (1970), nor an appealable interlocutory order under any existing exception to the final judgment rule, and thus the court of appeals did not have jurisdiction to hear the appeal as to them.

the requests for injunctive relief holding that the trial judge properly invoked the doctrine of primary jurisdiction (Pet. App. A, pp. 16a-17a), specifically reaffirming the district court's finding that the need for uniformity (Pet. App. A, pp. 8a-10a) and a tribunal of special competence (Pet. App. A, pp. 10a-11a) had been demonstrated in this case. (Pet. App. A, p. 16a.) In denying petitioners' request for rehearing (Pet. App. B, p. 18a-19a), the court of appeals found this Court's decision in *Nader* v. *Allegheny Airlines, Inc.*, 44 U.S.L.W. 4803 (U.S. June 7, 1976)[5] distinguishable in that (a) unlike *Nader* (which involved a common law tort action for damages), the *damage action* against Delta and Value Engineering continues to proceed below and was not disturbed by the court's dismissal of the action for *injunctive* relief on the grounds that petitioners were attempting to compel the court to fashion a regulation through an injunction when (i) there is an ongoing rulemaking proceeding on the subject before the agency and (ii) petitioners had made no appearance therein, and (b) contrary to *Nader* (in which this Court held that the damages action for fraudulent misrepresentation was "within the conventional competence of the courts" with "the judgment of a technically expert body not likely to be helpful in the application of the standards to the facts", 44 U.S.L.W. at 4808), this action is for injunctive relief, not damages, and, in

[5]This Court's decision in *Nader* has not yet appeared in the official reports and, accordingly, citations to that decision will be to *United States Law Week* (U.S.L.W.).

the view of the court of appeals, brings into play considerations of uniformity and agency expertise. (Pet. App. B, p. 19a.)

ARGUMENT

This case presents no important question warranting review. It involves only the question whether, in the particular circumstances shown here, the court of appeals correctly affirmed, in accordance with well-established principles of the doctrine of primary jurisdiction, the district court's determination that petitioners' claim for injunctive relief should, in the first instance, be considered by the administrative agency charged by Congress with the primary responsibility for nation-wide regulation of the transportation of hazardous materials. Contrary to petitioners' assertions, the affirmance of the district court's decision was proper under established primary jurisdiction principles, and review should, accordingly, be denied.

As this court has explained previously, the "doctrine of primary jurisdiction is concerned with promoting proper relationships between the courts and administrative agencies charged with particular regulatory duties." *United States* v. *Western Pacific R.R. Co.*, 352 U.S. 59, 63 (1956). In this regard, the Court has held that "in cases raising issues of fact not within the conventional experience of judges or cases requiring the exercise of administrative discretion, agencies created by Congress for regulating the subject matter should not be passed over." *Far East*

Conference v. *United States*, 342 U.S. 570, 574-75 (1952). This is so, "[e]ven when common-law rights and remedies survive and the agency in question lacks the power to confer immunity from common law liability," 44 U.S.L.W. at 4807.

The circumstances giving rise to appropriate invocation of this doctrine were explained succinctly in *United States* v. *Western Pacific R.R. Co.*, 352 U.S. 59, 64 (1956):

> No fixed formula exists for applying the doctrine of primary jurisdiction. In every case the question is whether the reasons for the existence of the doctrine are present and whether the purposes it serves will be aided by its application in the particular litigation. These reasons and purposes have often been given expression by this Court. In the earlier cases emphasis was laid on the desirable uniformity which would obtain if initially a specialized agency passed on certain types of administrative questions. See Texas & Pacific R. Co. v. Abilene Cotton Oil Co., 204 U.S. 426. More recently the expert and specialized knowledge of the agencies involved has been particularly stressed. See Far East Conference v. United States, 342 U.S. 570.[6]

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[6] As recently as last term in *Nader*, *supra*, this Court, in paraphrasing *Far East*, *supra*, confirmed the appropriateness of reference of "specific issues to an agency for initial determination where that procedure would secure 'uniformity and consistency in the regulation of business entrusted to a particular agency' or where

> 'the limited function of review by the judiciary [would be] more rationally exercised, by preliminary resort for ascertaining and interpreting the circumstances underlying legal issues to agencies that are better equipped than courts by specialization, by insight gained through experience, and by more flexible procedure.'" 44 U.S.L.W. at 4807.

The doctrine of primary jurisdiction is thus based on two distinct rationales: (1) the desire for uniformity of regulation; and (2) the need for an initial consideration by a tribunal with specialized knowledge and expertise. As found by the district court and court of appeals below and will be demonstrated *infra*, *both* of these reasons for applying this doctrine are present in this case, therefore obviating any need for review of the decision of the court of appeals by this Court.

Turning initially to the need for "uniformity and consistency in the regulation of" hazardous materials transportation, the court of appeals quite properly pointed out that one of the principal reasons that Congress passed the Hazardous Materials Transportation Act, 88 Stat. 2156, 49 U.S.C. §§ 1801-12 (1974 Supp.), was, indeed, to achieve a greater degree of uniformity of regulation in this area.[7] In this vein, the Senate Commerce Committee Report states as follows:

> "Title I of the bill draws the Federal Government's now-fragmented regulatory and enforcement power over the movement of hazardous materials in commerce into one consolidated and coordinated effort *under the direction of the Secretary of Transportation.*" S. Rep. No. 93-1192, 93d Cong., 2d Sess. 1 (1974) (emphasis supplied).

Moreover, Section 102 of the Act specifically

[7] In the words of the court of appeals, "it seems clear that Congress recognized the need for uniformity of regulation in this area when it passed the Hazardous Materials Transportation Act." (Pet. App. A, p. 8a.)

states the intention of Congress to "improve the regulatory authority and enforcement authority of the Secretary of Transportation" in this area, and the House Interstate and Foreign Commerce Committee Report provides that the statute was intended "to broaden federal regulatory control over interstate and foreign shipments of hazardous materials by rail and other transportation modes." H. Rep. No. 93-1083, 93d Cong., 2d Sess. 1 (1974). To that end, Section 105 of the Act provides:

> The Secretary may issue . . . regulations for the safe transportation in commerce of hazardous materials. Such regulations shall be applicable to any person who transports, or causes to be transported or shipped, a hazardous material, or who manufactures, fabricates, marks, maintains, reconditions, repairs, or tests a package or container which is represented, marked, certified, or sold by such person for use in the transportation in commerce of certain hazardous materials. *Such regulations may govern any safety aspect of the transportation of hazardous materials which the Secretary deems necessary or appropriate*, including, but not limited to, the packing, repacking, handling, labeling, marking, placarding, and routing . . . of hazardous materials . . . . 49 U.S.C. § 1804(a) (1974 Supp.) (emphasis supplied) (App. I, p. 4a).

Furthermore, the Senate Commerce Committee Report reinforces this Congressional concern for more uniform regulation:

> The prime difficulty, discussed by almost all of the witnesses in the June 12, 1974, hearing is that the fragmentation of regulatory power among the agencies dealing wtih [sic] the different modes of transportation blocks a coherent approach to the problem

> and creates a mass of conflicts of jurisdiction and regulation. The problem is heightened by the fact that most shipments involve more than one mode of transportation and thus are faced with differing regulations and enforcement authorities at different stages of a trip. S. Rep. 93-1192, *supra*, at 8.

And finally, Section 112 of the Act, initially proposed in the Senate bill, specifically preempts any state or local requirement inconsistent with any requirement of the Act unless "the Secretary determines . . . that such requirement affords an equal or greater level of protection to the public than is afforded by the requirements of this Act or regulations issued under this Act and does not burden interstate commerce." 49 U.S.C. § 1811. In reporting out this particular provision, the Senate Commerce Committee stated:

> The Committee endorses the principle of Federal preemption in order to preclude a multiplicity of State and local regulations and the potential for varying as well as conflicting regulations in the area of hazardous materials transportation. S. Rep. 93-1192, *supra*, at 37.

It is thus evident from these clear expressions of Congressional intent that the district court, initially (J.A. 133-34), and the court of appeals, in affirming (Pet. App. A, pp. 10a-11a), correctly found that the Hazardous Materials Transportation Act was addressed to a problem created, at least in part, by the existence of numerous regulatory bodies, and that Congress sought to remedy this situation by consolidating primary authority to regulate into the Secretary of Transportation or his delegate and thereby

promote uniformity of regulation.

Moreover, assuming *arguendo* that an airline has a duty to warn passengers of "unusual hazards", consideration of the chaos which could result from attempts by various district courts to ascertain whether the transportation of radioactive materials in passenger-carrying aircraft constitutes such an "unusual hazard" (and then to fashion the relief as requested by petitioners)[8] reveals why such a question should not be decided on an *ad hoc* basis by various courts, but instead must be determined in the context of the broader regulatory scheme. Assume, for example, that the district court in this case had made a determination that transportation of x amount of radioactive material presented an "unusual hazard" and granted the requested relief, and that, in another similar case involving Delta, a second court were to determine that only at a level of x + y did carriage of such radioactive material present such a hazard and granted the requested relief accordingly—which order should Delta follow and, more importantly, how could such conflicting technical, factual determinations be reconciled effectively both with themselves and the Department of

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[8] As alluded to earlier and discussed in greater detail *infra*, grant of petitioners' requested relief would have required the district court to determine, in addition, what constitutes an "adequate warning", a "significant amount of radioactive material", and how much such material constitutes "enough" so as to present a "risk of serious harm to humans", thus creating additional opportunities for inconsistency and disparate requirements.

Transportation's regulatory scheme without prior resort to the Department? Furthermore, the "standard" would be applicable to Delta alone and no other airline would be bound because of the *ad hoc* nature of each determination. The potential for such varying standards is obvious and this is clearly the reason that Congress decided that an expert regulatory body, the Department of Transportation, should make the initial determination as to whether the carriage, on passenger-carrying aircraft, of radioactive materials used in research or medical diagnosis or treatment poses an "unreasonable hazard to health and safety", 49 U.S.C. § 1807, and why the invocation of the doctrine of primary administrative jurisdiction in order to maintain *uniformity* of regulation of the transportation of hazardous materials throughout the Nation was particularly appropriate in this case.

With regard to the question of the need for technical expertise, the court of appeals correctly affirmed the trial court's finding that the injunctive relief requested by the petitioners "involves both technical and policy questions which have industry-wide application" (J.A. 136), and properly held that the requested relief "'requires the resolution of issues which under a regulatory scheme, have been placed within the special competence of an administrative body'". (Pet. App. A, p. 10a.) In this regard, it would be hard to imagine a more appropriate case for such referral than the case presently before this Court in which petitioners requested the district court (a) to make a threshold determination that the

carriage of radioactive materials aboard passenger-carrying aircraft constitutes an "unusual hazard" requiring the requested relief,[9] and (b) then, for the purposes of granting relief, to determine, *inter alia*, what constitutes an "adequate warning," "enough radioactive material to present a risk of serious harm to humans in the event of emanation or leakage," or "a significant amount of radiation" (J.A. 20). Such questions, which raise "issues of fact not within the conventional expertise of judges", 342 U.S. at 574, are exactly the ones this Court has stated are better left to "agencies that are better equipped than courts by specialization, by insight gained through experience, and by more flexible procedure." 342 U.S. at 575.

As properly pointed out by the court of appeals, the injunctive relief sought by petitioners "would, in effect, constitute a regulation covering one phase of hazardous materials on one airline. Such determinations are better made on an industry-wide basis in an agency rulemaking proceeding, and this indeed is the choice which Congress has made in enacting the

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[9]Section 108 of the Hazardous Materials Transportation Act specifically provides that the Secretary of Transportation shall issue regulations prohibiting the transportation of radioactive materials on passenger-carrying aircraft *unless* "the radioactive materials involved are intended for use in, or incident to, research, or medical diagnosis or treatment" *and only if* "such materials as prepared for and during the transportation *do not pose an unreasonable hazard to health and safety.*" 49 U.S.C. § 1807 (emphasis added) (App. 1, p. 5a).

Hazardous Materials Transportation Act." (Pet. App. A, p. 11a).[10]

Thus, the court of appeals' determination that the need for uniformity and a tribunal of special competence have been shown in this case is well founded and fully supported. Consequently, under the circumstances presented by this case, that court's affirmance of the district court's invocation of the doctrine of primary jurisdiction is eminently correct, and, therefore, presents no issue warranting review by this Court.

In view of the compelling nature of the need for use of the doctrine of primary jurisdiction in this case, it is not surprising that petitioners were forced to resort to confused, and somewhat tortured,

[10] In this regard, as noted by the court of appeals (Pet. App., pp. 11a-13a), to the extent that the Kappelmanns sincerely desire to have the requested relief imposed, they have failed to participate in at least three separate rulemaking proceedings conducted by the Department of Transportation in which petitioners' request for posted notice might have been considered. Under these circumstances, the court of appeals was quite properly reluctant to acquiesce in petitioners' suggestion that the agency should now be bypassed. (Pet. App., pp. 12a-13a.) Moreover, petitioners could petition the agency under 5 U.S.C. § 553(e) (1970) (App. I, p. 1a-2a) for issuance of an industry-wide rule similar to that which they seek to impose upon Delta by injunction in this proceeding. To the extent that the response of the agency is unsatisfactory, review in federal court is available. 5 U.S.C. § 706(1) (1970) (App. I, p. 2a-3a). *See, e.g., Environmental Defense Fund, Inc.* v. *Ruckleshaus*, 439 F.2d 584, 593 (D.C. Cir. 1971); *Environmental Defense Fund, Inc.* v. *Hardin*, 428 F.2d 1093, 1099 (D.C. Cir. 1970).

arguments in support of review. As will be demonstrated below, however, these arguments are without merit and, therefore, the issues presented should not be reviewed by this Court.

First, the decision of the court of appeals to invoke the doctrine of primary jurisdiction is not "directly opposed" to this Court's ruling in *Nader, supra*. The *Nader* decision held only that "under the circumstances of this case," 44 U.S.L.W. at 4804, a common law tort action seeking damages based on alleged fraudulent misrepresentation by an air carrier subject to regulation by the Civil Aeronautics Board should not be stayed pending reference to the Board for a determination whether the practice is "deceptive" within the meaning of Section 411 of the Federal Aviation Act of 1958, as amended, 72 Stat. 769, 49 U.S.C. § 1381. (App. I, p. 6a-7a.) In so holding, the Court merely determined that Section 411 of that Act does not provide the Board with authority to immunize carriers from common law liability and that, under the particular circumstances presented in the *Nader* case, considerations of uniformity in regulation and of technical expertise did not call for prior reference to the Board.[11]

[11] More specifically, the Court noted that (a) the *damage* action brought by petitioner does not turn, for example, on a determination of the reasonableness of a challenged carrier practice (a determination which, the Court states, could be facilitated by an informed evaluation of the economics or technology of the regulated industry), and (b) the standards to be applied in an action for fraudulent misrepresentation are within the conventional competence of the courts, and the judgment of a technically expert body is not likely to be helpful in the application of these standards to the facts in that case. 44 U.S.L.W. at 4808.

The *Nader* decision is distinguishable from the instant case on several grounds and, therefore, the decision of the court of appeals does not "directly conflict" with *Nader*. Initially, it is important to note that, contrary to Section 411, the Hazardous Materials Transportation Act does authorize the Secretary of Transportation, based upon appropriate findings, to grant the relief requested by petitioner herein and, as discussed *supra* and properly pointed out by the court of appeals, petitioners have never made an appearance in the various rulemaking proceedings on this subject conducted, contemporaneously with the pursuit of this litigation in the courts below, by the Department of Transportation under this authority. Moreover, in contradistinction to the *Nader* case in which dismissal of the damage action was sought and rejected by this Court, the court of appeals herein merely affirmed, after determining the need for resort to an expert agency, the dismissal of the action for *injunctive* relief against Delta[12]—the damages action against Delta and Value Engineering proceeds below and was not disturbed by the court's ruling. And finally, as held by the court of appeals, petitioners' request for injunctive relief brings into play important considerations of uniformity and agency expertise, found by this Court not to be

[12] *See Carnation Co.* v. *Pacific Westbound Conference*, 383 U.S. 213, 222-23 (1966) (in which this Court discussed the particular need for resort, in the first instance, to an administrative agency in cases concerning requests for injunctive relief involving subject matter within that agency's specialized field).

present in *Nader* (Pet. App., p. 19a), which require invocation of the doctrine of primary jurisdiction.

Second, rather than the "dangerous extension of the doctrine of primary jurisdiction" bemoaned by petitioners, the court of appeals' use of the doctrine of primary jurisdiction in this case was most appropriate, particularly in view of the broad nature of the injunctive relief sought by petitioners. Moreover, as pointed out *supra*, petitioners have not "lost" any common law rights or duties, such as they may be, for the Secretary of Transportation, or his delegate, has ample authority to grant the relief requested.

And finally, petitioners' claim that the decision of the court of appeals results in repeal or modification of equitable remedies and common law duties reflects a misunderstanding of both that court's decision and the reasons underlying the use, by courts, of the doctrine of primary jurisdiction.[13] Initially and contrary to petitioners' contentions, the

[13] Indeed, application of the doctrine in the circumstances here presented is hardly "novel", for this Court, speaking through Justice Brandeis in 1922, stated that the determining factor in deciding to invoke the doctrine of primary jurisdiction is ordinarily not the character of the function administrative or adjudicative, but the character of the controverted question and the nature of the inquiry necessary for its solution, specifically noting that preliminary resort to the specialized agency is required in cases concerning the reasonableness of a future practice, such as that requested by petitioners herein. *Great Northern Ry. Co.* v. *Merchants Elevator Company*, 259 U.S. 285, 291 (1922).

court of appeals merely found that, under the particular circumstances of this case and in consideration of the nature of the remedy requested by petitioners, the demonstrated need for uniformity and a tribunal of special competence required invocation of the doctrine of primary jurisdiction and consequent consideration by the Secretary of Transportation of the issues raised by petitioners' requested relief.[14] Thus, rather than repealing equitable remedies and common law duties, the court was merely striking the proper balance, given the relief requested, between the relative responsibilities

[14] In this regard, petitioners' assertions (Pet. at 9) that the agencies charged with administering the Federal Aviation Act and the Hazardous Materials Transportation Act have clearly rejected the common law duty to warn as a basis for rulemaking and referral would constitute an "empty ritual" are erroneous. As noted by the court of appeals, two of the instances cited took place before the enactment of the Hazardous Materials Transportation Act and thus cannot be taken to reflect current policy. With regard to the third instance cited to the court of appeals by petitioners, the court stated that it did not believe this determination to be a clear expression of policy on the issue before the court and that, in any event, it was unwilling to permit petitioners to substitute a decision by the Materials Transportation Board on a particular state regulation, for the record that would be developed during a rulemaking proceeding on the subject. (Pet. App., p. 16a.) And finally, as to the instance raised for the first time in petitioners' petition to this Court (the scanning of passenger plane floors with radiation detection devices), this incident also took place before the enactment of the Hazardous Materials Transportation Act and thus, as noted by the Court of Appeals as to the other incidents cited by petitioners, cannot be taken to reflect current policy and, in any event, did not involve the question of passenger notice raised by petitioners' requested relief.

and abilities of the court and the Secretary of Transportation under the Hazardous Materials Transportation Act—the touchstone of the doctrine of primary jurisdiction.

Indeed, it was only because the court of appeals, in its discretion and after evaluating the needs of this particular case, properly affirmed dismissal (rather than deferral) of the injunctive relief requests, that petitioners can even raise an allegation that this determination "repealed" equitable remedies or common law duties. Contrary to petitioners' contention, the dismissal was neither a determination nor an abrogation of such remedies or rights.

Once having determined that primary resort to an agency is required, a court, in a proceeding in which the doctrine of primary jurisdiction is properly invoked, has the choice, based upon the particular circumstances presented, of dismissing or staying the proceedings.[15]

In the instant case, the court of appeals properly dismissed the requests for injunctive relief since (a) the nature of the remedy requested made it difficult, if not impossible, for the court to grant relief without an administrative record,[16] and (b) no party would be prejudiced thereby since, rather than being an empty "ritual", the Secretary of Transportation

[15] 3 K. Davis, *Administrative Law Treatise* § 19.07(2) (1958).

[16] Pet. App., p. 16a; 3 K. Davis, *Administrative Law Treatise* § 19.07(2) (1958).

or his delegate, unlike the situation in *Nader*, has full authority upon a proper showing to grant the requested relief (and, if petitioners seek such relief and make appropriate showings, may in fact grant that relief), and any determination made with regard to that relief would be subject to review. Thus, rather than repealing "equitable remedies and common law duties",[17] the court of appeals merely found that no purpose will here be served to hold the present action in abeyance in the District Court while the proceedings before the Secretary of Transportation and subsequent judicial review or enforcement of his order are being pursued, correctly noting that "a similar suit is easily initiated later, if appropriate", and properly holding that "[b]usiness-like procedure counsels that the ... complaint should now be dismissed."[18] (Pet. App., p. 16a).

In summary, petitioners have simply failed to demonstrate that this case is within the Court's guidelines for granting writs of certiorari and, therefore, there is no basis for granting such a writ; there is here no special or important reason for grant of a writ; there is here no conflict with the decision

[17] If the court had found that "equitable remedies and common law duties" had been repealed or modified by these Acts, there would obviously have been no reason to consider whether the proceedings should be stayed or dismissed.

[18] *See Far East Conference* v. *United States*, 342 U.S. 570, 577 (1952) (dismissal appropriate when no party is prejudiced thereby).

of another court of appeals; there has been no departure from the accepted and usual course of judicial proceedings; and, contrary to petitioners' assertions which were disposed of *supra*, there is here presented neither any conflict with a decision of this Court on a federal question nor any important question of federal law which has not been, but should be, settled by this Court. Petitioners are, in short, merely disappointed appellants seeking another hearing. Accordingly, a writ should not issue.

CONCLUSION

For the foregoing reasons, Delta Air Lines, Inc., respectfully submits that the petition for certiorari should be denied.

Respectfully submitted,

Of Counsel:

HALE RUSSELL GRAY
SEAMAN & BIRKETT
1001 Connecticut Avenue, N.W.
Washington, D.C. 20036

CONDON & FORSYTH
1251 Avenue of the Americas
New York, New York 10020

ROBERT REED GRAY
JOHN E. GILLICK, JR.
1001 Connecticut Avenue, N.W.
Washington, D.C. 20036

Attorneys for Respondent
Delta Air Lines, Inc.

December 22, 1976

APPENDIX

APPENDIX I

STATUTES INVOLVED

I. Administrative Procedure Act, 80 Stat. 381, *as amended*, 5 U.S.C. § 551 *et seq.*

A. *Section 553*

RULE MAKING

"(a) This section applies, according to the provisions therefor, except to the extent that there is involved—

(1) a military or foreign affairs function of the United States; or

(2) a matter relating to agency management or personnel or to public property, loans, grants, benefits or contracts.

(b) General notice of proposed rule making shall be published in the Federal Register, unless persons subject thereto are named and either personally served or otherwise have actual notice thereof in accordance with law. The notice shall include—

(1) a statement of the time, place, and nature of public rule making proceedings;

(2) references to the legal authority under which the rule is proposed; and

(3) either the terms or substance of the proposed rule or a description of the subjects and issues involved.

Except when notice or hearing is required by statute, this subsection does not apply—

(A) to interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice; or

(B) when the agency for good cause finds (and incorporates the finding and a brief statement of reasons therefor in the rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest.

(c) After notice required by this section, the agency shall give interested persons an opportunity to participate

in the rule making through submission of written data, views, or arguments with or without opportunity for oral presentation. After consideration of the relevant matter presented, the agency shall incorporate in the rules adopted a concise general statement of their basis and purpose. When rules are required by statute to be made on the record after opportunity for an agency hearing, sections 556 and 557 of this title apply instead of this subsection.

(d) The required publication or service of a substantive rule shall be made not less than 30 days before its effective date, except—

(1) a substantive rule which grants or recognizes an exemption or relieves a restriction;

(2) interpretative rules and statements of policy; or

(3) as otherwise provided by the agency for good cause found and published with the rule.

(e) Each agency shall give an interested person the right to petition for the issuance, amendment, or repeal of a rule."

(80 Stat. 383, 5 U.S.C. § 553)

B. *Section 706*

Scope of Review

"To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall—

(1) compel agency action unlawfully withheld or unreasonably delayed; and

(2) hold unlawful and set aside agency action, findings, and conclusions found to be—

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(B) contrary to constitutional right, power, privilege, or immunity;

(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;

(D) without observance of procedure required by law;

(E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or

(F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error."

(80 Stat. 393, 5 U.S.C. § 706)

II. The Hazardous Materials Transportation Act, 88 Stat. 2156 *et seq.*, 49 U.S.C. § 1801 *et seq.*

A. *Section 102*

DECLARATION OF POLICY

It is declared to be the policy of Congress in this title to improve the regulatory and enforcement authority of the Secretary of Transportation to protect the Nation adequately against the risks to life and property which are inherent in the transportation of hazardous materials in commerce.

(88 Stat. 2156, 49 U.S.C. § 1801)

B. *Section 104*

DESIGNATION OF HAZARDOUS MATERIALS

Upon a finding by the Secretary, in his discretion, that the transportation of a particular quantity and form of material in commerce may pose an unreasonable risk to health and safety or property, he shall designate such quantity and form of material or group or class of such

materials as a hazardous material. The materials so designated may include, but are not limited to, explosives, radioactive materials, etiologic agents, flammable liquids or solids, combustible liquids or solids, poisons, oxidizing or corrosive materials, and compressed gases.

(88 Stat. 2156, 49 U.S.C. § 1803)

C. *Section 105*

REGULATIONS GOVERNING TRANSPORTATION OF HAZARDOUS MATERIALS

"(a) GENERAL. The Secretary may issue, in accordance with the provisions of section 553 of title 5, United States Code, including an opportunity for informal oral presentation, regulations for the safe transportation in commerce of hazardous materials. Such regulations shall be applicable to any person who transports, or causes to be transported or shipped, a hazardous material, or who manufactures, fabricates, marks, maintains, reconditions, repairs, or tests a package or container which is represented, marked, certified, or sold by such person for use in the transportation in commerce of certain hazardous materials. Such regulations may govern any safety aspect of the transportation of hazardous materials which the Secretary deems necessary or appropriate, including, but not limited to, the packing, repacking, handling, labeling, marking, placarding, and routing (other than with respect to pipelines) of hazardous materials, and the manufacture, fabrication, marking, maintenance, reconditioning, repairing, or testing of a package or container which is represented, marked, certified, or sold by such person for use in the transportation of certain hazardous materials.

(b) COOPERATION. In addition to other applicable requirements, the Secretary shall consult and cooperate with representatives of the Interstate Commerce Commission and shall consider any relevant suggestions made by such Commission, before issuing any regulation with respect to the routing of hazardous materials. Such Commission shall, to the extent of its lawful authority, take such action

as is necessary or appropriate to implement any such regulation.

(c) REPRESENTATION. No person shall, by marking or otherwise, represent that a container or package for the transportation of hazardous materials is safe, certified, or in compliance with the requirements of this Act, unless it meets the requirements of all applicable regulations issued under this Act.

(88 Stat. 2157, 49 U.S.C. § 1804)

D. *Section 108*

TRANSPORTATION OF RADIOACTIVE MATERIALS ON PASSENGER-CARRYING AIRCRAFT

(a) GENERAL. Within 120 days after the date of enactment of this section, the Secretary shall issue regulations, in accordance with this section and pursuant to section 105 of this title, with respect to the transportation of radioactive materials on any passenger-carrying aircraft in air commerce, as defined in section 101(4) of the Federal Aviation Act of 1958, as amended (49 U.S.C. 1301 (4)). Such regulations shall prohibit any transportation of radioactive materials on any such aircraft unless the radioactive materials involved are intended for use in, or incident to, research, or medical diagnosis or treatment, so long as such materials as prepared for and during transportation do not pose an unreasonable hazard to health and safety. The Secretary shall further establish effective procedures for monitoring and enforcing the provisions of such regulations.

(b) DEFINITION. As used in this section, "radioactive materials" means any materials or combination of materials which spontaneously emit ionizing radiation. The term does not include materials in which (1) the estimated specific activity is not greater than 0.002 microcuries per gram of material; and (2) the radiation is distributed in an essentially uniform manner.

(88 Stat. 2159, 49 U.S.C. § 1807)

E. *Section 112*

RELATIONSHIP TO OTHER LAWS

(a) GENERAL. Except as provided in subsection (b) of this section, any requirement, of a State or political subdivision thereof, which is inconsistent with any requirement set forth in this title, or in a regulation issued under this title, is preempted.

(b) STATE LAWS. Any requirement, of a State or political subdivision thereof, which is not consistent with any requirement set forth in this title, or in a regulation issued under this title, is not preempted if, upon the application of an appropriate State agency, the Secretary determines, in accordance with procedures to be prescribed by regulation, that such requirement (1) affords an equal or greater level of protection to the public than is afforded by the requirements of this title or of regulations issued under this title and (2) does not unreasonably burden commerce. Such requirement shall not be preempted to the extent specified in such determination by the Secretary for so long as such State or political subdivision thereof continues to administer and enforce effectively such requirement.

(c) OTHER FEDERAL LAWS. The provisions of this title shall not apply to pipelines which are subject to regulation under the Natural Gas Pipeline Safety Act of 1968 (49 U.S.C. 1671 et seq.) or to pipelines which are subject to regulation under chapter 39 of title 18, United States Code.

(88 Stat. 2161, 49 U.S.C. § 1811)

III. The Federal Aviation Act of 1958, 72 Stat. 731, *as amended*, 49 U.S.C. § 1301 *et seq.*

A. *Section 411*

METHODS OF COMPETITION

"The Board may, upon its own initiative or upon complaint by any air carrier, foreign air carrier, or ticket agent, if it

considers that such action by it would be in the interest of the public, investigate and determine whether any air carrier, foreign air carrier, or ticket agent has been or is engaged in unfair or deceptive practices or unfair methods of competition in air transportation or the sale thereof. If the Board shall find, after notice and hearing, that such air carrier, foreign air carrier, or ticket agent is engaged in such unfair or deceptive practices or unfair methods of competition, it shall order such air carrier, foreign air carrier, or ticket agent to cease and desist from such practices or methods of competition."

(72 Stat. 769, 49 U.S.C. § 1381)